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No. 89-763

In the Supreme Court of the United States

OCTOBER TERM, 1989

MICHAEL S. FERDINAND, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF MILITARY APPEALS

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the erroneous admission of the out-of-court statement of petitioner's daughter was harmless error.

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OPINIONS BELOW

The opinion of the Court of Military Appeals (Pet. App. 1a-10a) is reported at 29 M.J. 164. The opinion of the Air Force Court of Military Review (Pet. App. 11a-12a) is unreported.

JURISDICTION

The judgment of the Court of Military Appeals was entered on September 27, 1989. The petition for a writ of certiorari was filed on November 14, 1989. The jurisdiction of this Court is invoked under 28 U.S.C. 1259(3) (Supp. V 1987).

STATEMENT

Petitioner, a member of the United States Air Force, was tried by a general court-martial at Offutt Air Force Base

in Nebraska. He was convicted of various types of indecent conduct in four separate specifications involving his six-year-old daughter, all in violation of Article 134 of the Uniform Code of Military Justice (UCMJ), 10 U.S.C. 934, and Para. 87, *Manual for Courts-Martial, United States – 1984* (*Manual*) IV-129.[1] He was sentenced to four years' confinement, a dishonorable discharge, and a reduction in rank. The convening authority approved the findings and sentence. The Air Force Court of Military Review affirmed the findings and sentence. Upon discretionary review, the Court of Military Appeals affirmed.

1. Toward the end of March 1987, petitioner wrote a letter to his wife, Joann Ferdinand, in which he admitted that he had molested their six-year-old daughter for the past four years. Tr. 39-40, 42.[2] The next day Mrs. Ferdinand called the YWCA. Tr. 41. She was told that either she or petitioner would have to report the matter to the authorities, or that someone at the YWCA would do so. *Ibid.* Mrs. Ferdinand told petitioner, and on March 30 he called

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[1] Article 134 of the UCMJ is known as the General Article. It punishes three categories of crimes – termed Clause 1, Clause 2, and Clause 3 offenses – that are not expressly defined by other, more specific provisions of the Code. Clause 1 punishes "disorders and neglects to the prejudice of good order and discipline in the armed forces"; Clause 2 punishes "conduct of a nature to bring discredit upon the armed forces"; and Clause 3 punishes crimes in violation of federal laws applicable to civilians. Para. 60(c), *Manual* IV-109 to IV-110. Paragraphs 61-113 of the *Manual* flesh out the conduct that violates Clauses 1 and 2 by defining specific offenses under Article 134. See *Manual* IV-111 to IV-147. Paragraph 87, of which petitioner was convicted, makes it a crime to commit indecent acts or to take indecent liberties with a child. *Id.* IV-129. See also *id.* paras. 89c, 90c, *Manual* IV-131 (defining the term "indecent").

[2] Petitioner decided that a letter was the only way to break the news to his wife, instead of a face-to-face disclosure. Tr. 134.

John Zach of the Child Protective Services for the Department of Social Services in Sarpy County, Nebraska. Tr. 41, 55. After telling Zach that he had molested his daughter and that he wanted to turn himself in, petitioner was put in touch with Robin Gabriel, a deputy sheriff. Tr. 51, 55. Petitioner met with Gabriel the next morning, and he confessed to abusing his daughter, Tr. 55-62, 79-80, although he denied having had sexual intercourse with her, Tr. 59. Petitioner said that the acts occurred approximately once every four months, with the last one occurring about a month beforehand. Tr. 61, 73, 75.

The following day, April 1, Robin Gabriel interviewed petitioner's daughter. Tr. 42-43, 62, 67-71. The interview was recorded by audio cassette tape and reduced to a transcript. Tr. 63; PX 1. Petitioner's daughter corroborated petitioner's account of his misconduct. Tr. 67-71.

2. The government subpoenaed petitioner's daughter, but Mrs. Ferdinand refused to allow her daughter to testify at trial, for various reasons. Pet. App. 2a-4a; Tr. 30-38.[3] After finding that petitioner's daughter was unavailable to testify, Tr. 39, the trial judge admitted, over a defense

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[3] Mrs. Ferdinand disobeyed a subpoena directing her to bring her daughter to trial. Mrs. Ferdinand said that she would not allow her daughter to testify, even after the trial judge ordered her to do so, and that she fully understood the possible consequences of her recalcitrance. Tr. 32, 35, 36-38; PX 2. Mrs. Ferdinand refused to do so because she believed, based upon advice from two of her daughter's counselors, that bringing her daughter to court would be detrimental to her daughter's therapy. Tr. 32-33. Mrs. Ferdinand also was reluctant to produce her daughter because Mrs. Ferdinand had been advised that the state court guardian ad litem, who was assigned to her daughter once the charges against petitioner became known, would try to have her daughter placed in state custody if Mrs. Ferdinand disobeyed a state juvenile court order restraining her daughter from testifying in any court except the county juvenile court. Tr. 33-35. See Pet. App. 2a-4a, 7a-9a.

objection, Tr. 46-47, the transcript of her taped interview with Deputy Sheriff Gabriel pursuant to Mil. R. Evid. 804(b)(5), the so-called residual hearsay exception applicable to cases in which the declarant is unavailable. Tr. 67. In addition to the interview transcript, the government introduced the testimony of Deputy Sheriff Gabriel regarding petitioner's confession; Mrs. Ferdinand's testimony about petitioner's March 1987 letter; testimony by a Captain Veronica Kane, a pediatric nurse practitioner, about her clinical examination of petitioner's daughter;[4] and an inculpatory statement petitioner made to a Sergeant Joseph Pierce.[5]

3. On appeal, petitioner argued that the trial judge erred by admitting the transcript of his daughter's taped interview with Deputy Sheriff Gabriel. The Court of Military Appeals agreed, holding that the admission of the interview transcript violated petitioner's rights under the Confrontation Clause of the Sixth Amendment, because the government had not adequately shown that petitioner's daughter was unavailable to testify. Pet. App. 4a. Nonetheless, the court determined that the error did not require reversal. The court explained that "[u]pon examination of the record * * * we are convinced that admission of [the] statements was harmless beyond a reasonable doubt." *Id.* at 9a. The court specifically observed that "[i]n addition to [petitioner's] confession and admission to his wife about

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[4] Captain Kane performed a vaginal examination of petitioner's daughter, which revealed that petitioner's daughter did not have a hymen. Captain Kane, who performed an average of 20 such examinations per week on prepubescent girls, Tr. 85, 86, testified that that was "a very rare finding" in girls the age of petitioner's daughter, Tr. 90, 93, and that her finding was consistent with some of the misconduct charged against petitioner, Tr. 90-91.

[5] About six weeks before trial, petitioner told Sergeant Pierce that "I did those things." Tr. 83.

molesting his daughter, an Air Force Nurse gave corroborating physical evidence after having examined [petitioner's] daughter." *Id.* at 9a n.7.

ARGUMENT

Petitioner's sole claim is that the erroneous admission of his daughter's interview statements to Deputy Sheriff Gabriel was not harmless error.

The admission of evidence in violation of the Confrontation Clause can be harmless in a particular case. *Brown* v. *United States*, 411 U.S. 223 (1973); *Schneble* v. *Florida*, 405 U.S. 427 (1972); *Harrington* v. *California*, 395 U.S. 250 (1969). See *Coy* v. *Iowa*, 108 S. Ct. 2798, 2803 (1988); *Delaware* v. *Van Arsdall*, 475 U.S. 673, 681-684 (1986). The question an appellate court must answer is whether, based on the entire record, the government has shown beyond a reasonable doubt that the erroneously admitted evidence did not contribute to the verdict. *Delaware* v. *Van Arsdall*, 475 U.S. at 684; *Chapman* v. *California*, 386 U.S. 18, 24 (1967). The Court of Military Appeals correctly applied that standard in this case. Pet. App. 9a. The court found that, in light of the entire record – petitioner's confession to Deputy Sheriff Gabriel, petitioner's inculpatory letter to his wife, petitioner's inculpatory remark to his sergeant, and the results of Captain Kane's physical examination of petitioner's daughter – the erroneous admission of the interview transcript was harmless beyond a reasonable doubt. *Id.* at 9a & n.7. Because the Court of Military Appeals properly applied the *Chapman* harmless error standard to the facts of this case, that court's fact-bound determination that the error in this case was harmless does not warrant review by this Court. See *Francis* v. *Franklin*, 471 U.S. 307, 326 n.10 (1985) ("The primary task of this Court upon review of a harmless-error determination by the court of appeals

is to ensure that the court undertook a thorough inquiry and made clear the basis of its decision.").

Petitioner implicitly concedes that the error was harmless if his confession to Deputy Sheriff Gabriel can be considered, and he therefore challenges the Court of Military Appeals' reliance on his confession. Pointing to cases such as *Smith* v. *United States*, 348 U.S. 147 (1954), which reiterated the rule in the federal courts that a defendant may not be convicted on the basis of his uncorroborated confession alone, petitioner argues that without his daughter's statements to Gabriel, there was insufficient evidence to corroborate his confession, and that without such corroboration, his confession cannot be considered in determining whether the error was harmless.

Petitioner errs in claiming that his daughter's interview statements were the only corroboration for his confession. The other evidence noted above also performed that function.[6] The corroboration necessary to support a conviction based on a defendant's confession may take the form of independent proof that "bolster[s] the confession itself and thereby prove[s] the offense 'through' the statements of the accused." *Smith* v. *United States*, 348 U.S. at 156. That was true here, because independent evidence corroborated peti-

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[6] Petitioner also claims that the trial judge implicitly found that Captain Kane's testimony was not itself sufficient to corroborate petitioner's confession, because the trial judge dismissed one specification (Specification 5) at the close of the government's case-in-chief. Pet. 7-8 & n.3. That argument is immaterial, because Captain Kane's testimony was not the sole corroboration for petitioner's confession. Moreover, the specification to which petitioner refers was not dismissed for lack of corroboration. Defense counsel moved to dismiss that specification on the ground that the interview transcript did not show that petitioner's conduct occurred during the period alleged in the specification. Tr. 98. The government agreed, Tr. 99-100, and the trial judge dismissed the specification without comment. Tr. 100.

tioner's confession to the crimes. Petitioner's fact-bound arguments to the contrary do not warrant further review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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